

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
307 McKIBBON STREET REALTY CORP.	:	DETERMINATION
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner, 307 McKibbon Street Realty Corp., 44 East 32nd Street, New York, New York 10016, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File No. 803226).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 30, 1987 at 9:15 A.M., with all briefs to be submitted by July 31, 1987. Petitioner appeared by Schonwald, Schaffzin & Mullman, Esqs. (Edmund A. Schaffzin and Karen L. Farnsworth, Esqs., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether the Audit Division properly aggregated the consideration received by petitioner with the consideration received by another corporation upon the simultaneous transfer by petitioner and such other corporation of two contiguous properties, thereby subjecting petitioner's transfer to tax under Tax Law Article ~~BINDINGS~~ OF FACT

1. On August 9, 1983, Mr. Richard Penzer, pursuant to previously executed contracts, purchased four properties located in Brooklyn, New York. The four properties were known as 79 Bogart Street, 304 Boerum Street, 307 McKibbon Street, and 328 Boerum Street.

2. Mr. Penzer's custom in purchasing realty was to purchase properties in corporate form and, more specifically, if the purchase involved more than one property, to purchase by the use of

more than one corporate entity (i.e. _____ to purchase each property through a separate corporation). The reason advanced for such practice was to gain the advantage, in the event of a disaster at one property, of limiting potential liability to the individual corporation's assets, thus protecting Mr. Penzer from exposure to financial liability as an individual. Mr. Penzer was entitled to and did consolidate his corporate holdings for income tax purposes. Accordingly, the property known as 79 Bogart Street was purchased by and in the name of 100 White Street Realty Corp., and the property known as 328 Boerum Street was purchased by and in the name of petitioner, 307 McKibbin Street Realty Corp. Mr. Penzer was the sole shareholder and officer of both of these corporations.

3. The two noted properties which are relevant to this proceeding, being 79 Bogart Street and 328 Boerum Street, are physically contiguous parcels of real property upon which are situated 100,000 square-foot commercial factory buildings. Although physically contiguous, each property had its own separate tax lot designation, separate boiler system, separate certificate of occupancy, separate electrical service and meter, and separate water meter. There were no party walls or passageways between or connecting the two premises.

4. Each of the properties was, to some extent, renovated (the specific nature of the renovations made is not relevant to the issue presented herein). The cost of such renovations was allocated equally to each of the buildings. This equal allocation was made as a matter of convenience, in that it was not feasible to allocate exact amounts to each parcel.

5. Prior to the transfers in question herein, the properties had not been put on the market or otherwise offered for sale. Rather, Mr. Penzer was approached by a real estate broker representing an interested purchaser, one John Rashti, in need of an empty factory building in order to relocate a manufacturing business out of Manhattan. In addition, Mr. Rashti was interested in additional space for potential future manufacturing needs. At the time, one of the subject properties was vacant, while the other was occupied by a tenant under a ten-year lease.

6. Negotiations were held between Mr. Penzer and Mr. Rashti, at the commencement of which the asking price for each of the premises individually was in excess of one million dollars. However, Mr. Rashti was able to negotiate the initial price for each building downward in view of the buildings' then-poor condition. Ultimately, the selling prices for the individual properties were agreed to as \$1,255,000.00 for 79 Bogart Street and \$995,000.00 for 328 Boerum Street. In view of the buyer's need to relocate his existing work force from Manhattan to Brooklyn, the vacant building (79 Bogart Street) was more valuable to the buyer than the premises (328 Boerum Street) which were encumbered by the ten-year lease, with such circumstance being a consideration in the individual selling prices as ultimately agreed to.

7. Separate contracts were entered into between 100 White Street Realty Corp. (for 79 Bogart Street) and John Rashti, as the contract vendee, and 307 McKibbin Street Realty Corp. (328 Boerum Street) and John Rashti, as the contract vendee. Both contracts were subsequently assigned and the transfers were made to another party, specifically Harry J. Rashti & Co., Ltd.

8. On December 18, 1984, simultaneous closings were held wherein the two properties were transferred to the contract assignee, Harry J. Rashti & Co., Ltd. A negotiated lump-sum amount of \$150,000.00 was paid to Robert W. Romano as the broker for the transactions. The brokerage agreement states that the two corporations, 307 McKibbin Street Realty Corp. and 100 White Street Realty Corp., were to pay the brokerage amount to the broker, with such agreement signed by Richard Penzer, as president, on behalf of both corporations. There is no language in the agreement specifying any allocation of the fee between the two properties, or indicating anything other than that the two corporations were jointly responsible for payment of the full brokerage fee.

9. In connection with the transfers, requisite transferor and transferee questionnaires were filed with the Audit Division. With respect to the transfer of 79 Bogart Street, gains tax (Tax Law Article 31-B) in the amount of \$85,062.31 was paid. With respect to 328 Boerum Street, the Audit Division took the position that the consideration received should be aggregated with

the consideration received in the transfer of 79 Bogart Street, and thus the consideration for the transfer of 328 Boerum Street, for gains tax purposes, was deemed to have exceeded the one million dollar gains tax threshold. Accordingly, gains tax of \$55,806.51 was computed, and was paid under protest by petitioner.

10. On December 18, 1984, petitioner filed a claim for refund of the aforementioned tax paid under protest. By a letter dated January 31, 1986, the Audit Division denied petitioner's claim for refund, and the instant proceeding ensued.

CONCLUSIONS OF LAW

A. That Tax Law § 1441, which became effective March 28, 1983, imposes a tax at the rate of 10 percent upon gains derived from the transfer of real property within New York State. However, Tax Law § 1443(1) provides that no tax shall be imposed if the consideration is less than one million dollars.

B. That Tax Law § 1440(7) provides, in part, as follows:

"'Transfer of real property' means the transfer or transfers of any interest in real property by any method.... Transfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article...."

C. That the facts reveal, in essence, a single transaction involving the sale of two contiguous properties to one transferee. Each of the properties was stated to have been purchased as an investment, with the ultimate aim being to generate rental income through renovation of the premises and rental to long-term commercial users. Petitioner's own presentation reveals that the premises were purchased by different corporate entities for the sole, albeit legitimate, purpose of affording to the sole shareholder of both entities the protection of limited liability. Further, it is clear that the transferee sought to purchase both properties, in consideration of its present space requirements as well as its potential future requirements.

D. That, in fact, it is clear that the two corporate transferors were acting in concert, in effect as one transferor through their common (sole) owner. It is at least arguable that Mr. Penzer, as the sole shareholder of both corporations, held a beneficial interest in each of the properties owned in the names of the respective corporations (Tax Law § 1440[4]). The principal reason advanced against aggregation of the consideration received is the fact that two separate corporate entities were involved as the transferors of record. To determine that aggregation, under these facts, is improper would be to create a broad exemption from the gains

tax based simply on the use of two or more entities as transferors. Creation of such an exemption was surely not the aim of the Legislature in its enactment of Tax Law Article 31-B (see _____ Matter of Bombart v. State Tax Commn., 516 NYS 2d 989). Accordingly, the Audit Division properly required aggregation of the consideration received for the transfer of the properties in question.

E. That the petition of 307 McKibbon Street Realty Corp. is hereby denied and the Audit Division's denial of petitioner's claim for refund is sustained.

DATED: Albany, New York
November 24, 1987

ADMINISTRATIVE LAW JUDGE